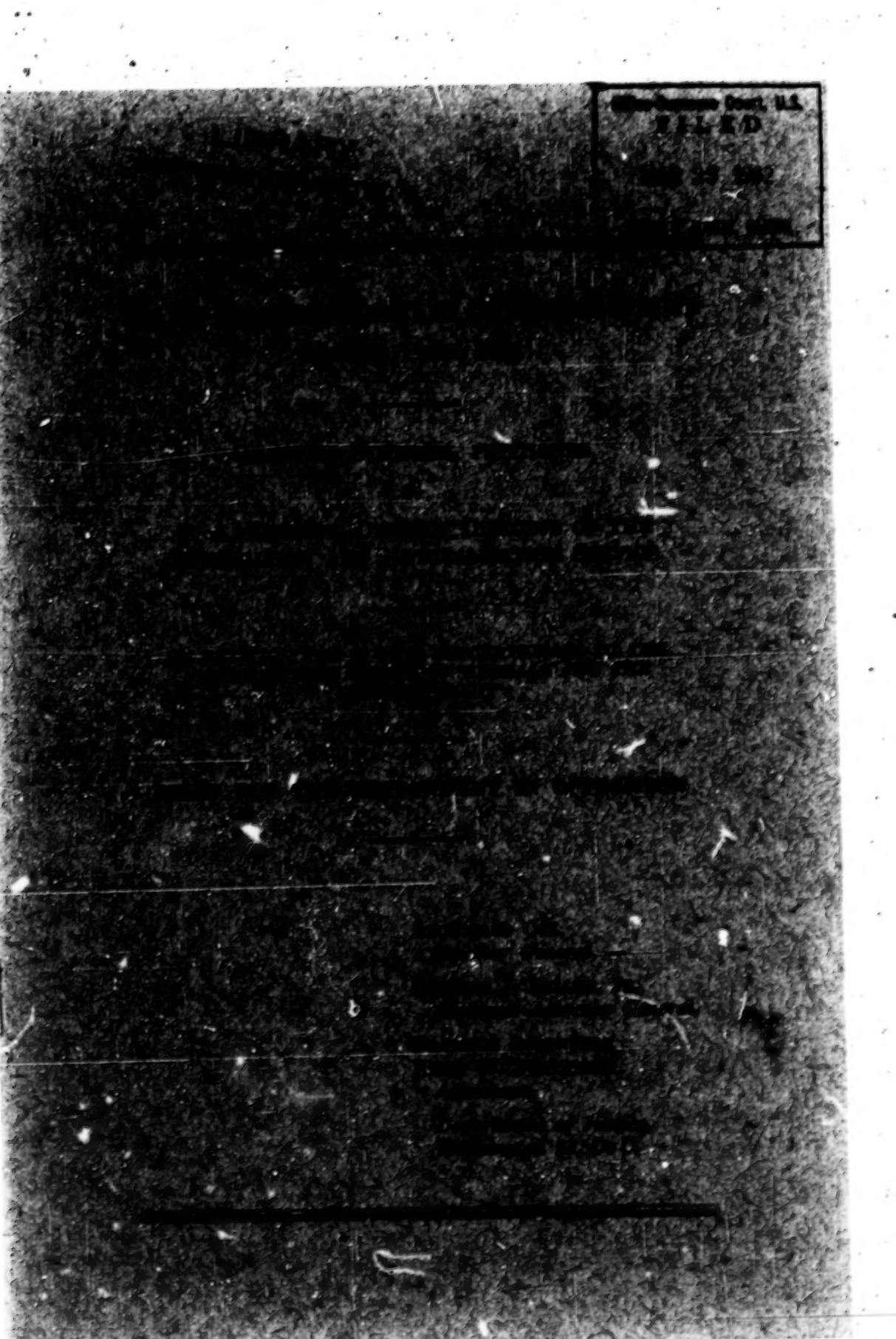
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 746

GRAZIANO DIMINICH, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19-27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1961. The petition for a writ of certiorari was filed on February 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Attorney General improperly refused to withhold deportation to Yugoslavia of petitioner, a Yugoslav seaman, who claimed that such deportation would result in his physical persecution.

2. Whether petitioner was denied a right to apply for refugee escapee status.

STATUTE INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, 66 Stat. 214 (8 U.S.C. 1253(h)), provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

STATEMENT

Petitioner, a Yugoslav seaman, instituted this action in the United States District Court for the Southern District of New York for a declaratory judgment and review of the refusal by the Attorney General to stay his deportation under Section 243(h) of the Immigration and Nationality Act of 1952, *supra*, authorizing such stay if an alien would be subject to physical persecution in the country of deportation (R. 55-60). The district court sustained the respondent's motion for summary judgment (R. 13). The court

of appeals affirmed (Pet. 19-27). The evidence may be summarized as follows:

1. Petitioner was born on January 11, 1938, in the Province of Pola, which was then a part of Italy but later became part of Yugoslavia. He attended school for about eight years. In October 1956 he was first employed as a crewman on a Yugoslav vessel. In November 1956 he deserted his ship in Venice and was interned in various Italian refugee camps for approximately nine months (R. 39-41, 45, 55). After being furnished with papers by the Italian government, petitioner shipped out on a Danish vessel bound for New York. He entered the United States at New York City on October 15, 1957, as a non-immigrant crewman for a period not to exceed twenty-nine days (R. 55-56) and remained in this country after the ship departed. He was apprehended on April 2, 1959. He was ordered deported to Yugoslavia, Italy having refused to accept him because he had lost his status as a refugee by failing to re-enter that country prior to May 22, 1958 (R. 56, 20-22).

2. Petitioner then applied for a stay of deportation, pursuant to Section 243(h) (R. 56). At the hearing before a Special Inquiry Officer, petitioner was the only witness. He testified that he had never served in the armed forces of any country. His uncle had been killed by the Yugoslav authorities because he was against communism. However, petitioner had never been discriminated against because of this, nor had he ever been arrested or otherwise in trouble with the government. The only way the authorities made trouble for him was that they wanted him to

join the Communist Party and they prevented him from going to mass, which he had been accustomed to attending since childhood (R. 42-43). In his native town he always attended church on Sunday. After he was employed aboard Yugoslav vessels he would attend church when he had the opportunity, but he was afraid that he would be seen and lose his job. (R. 46).

Petitioner also testified that he had abandoned his vessel in Italy because he was being urged to join the Communist Party and to attend their meetings, and because of interference with his attending church (R. 45, 56). He had not expressed himself against communism while he was in Yugoslavia or while he was on his ship because he would have landed in jail, but he had done so while in the Italian refugee camps and in this country (R. 42, 46). If he returned now, he might be punished for what he had said and for deserting his vessel, which proved that he was against communism (R. 43, 46-47). Petitioner testified that he had been receiving letters from his family. His father was working in a small factory. Petitioner had not been deprived of an opportunity to earn a living in Yugoslavia (R. 43).

3. The Special Inquiry Officer recommended against a stay of deportation. In doing so, he took into consideration the fact that neither petitioner nor any member of his immediate family had ever been arrested or in trouble with the Yugoslav authorities, although petitioner claimed that an uncle had been killed by the communists, and that petitioner had never been denied the opportunity to earn a living in

Yugoslavia. The Special Inquiry Officer also referred to an article appearing in the New York Times on August 17, 1958, written by Paul Underwood at Belgrade, Yugoslavia, in which it was said that conditions had greatly improved in recent years and that the government does not persecute the ordinary individual solely because he criticizes the communist regime. The Special Inquiry Officer assumed that petitioner would be punished for deserting his vessel in Italy, but found no indication that the punishment would be cruel or unusual (R. 48-52). On May 27, 1959, the Regional Commissioner ordered that the request for stay of deportation be denied (R. 53).

ARGUMENT

1. The primary question sought to be raised by petitioner, whether denial of the opportunity to earn a livelihood may constitute physical persecution within the meaning of Section 243(h) of the Immigration and Nationality Act, is not actually presented by this record.

Petitioner bases his claim to review upon an alleged conflict with *Dunat* v. *Holland*, C.A. 3, No. 13,307, set forth in the petition at pages 28 to 37. There the alien testified that members of his family were denied any kind of work because they refused to sign papers that they were not members of any church. Strong supporting testimony was also given (Pet. 31-33, fn. 2). A majority of the three-judge panel reversed and remanded the case for entry of an order not inconsistent with the opinion, the substance of which was that denial of an opportunity to

earn a livelihood would constitute physical persecution (Pet. 28-37). Judge Forman, dissenting, was of the view that the majority had unduly emphasized a single sentence in the report of the Special Inquiry Officer relating to denial of employment by reason of church membership and had ignored the findings as a whole. He was also of the view that Congress had vested the power set forth in Section 243(h) solely in the Attorney General (Pet. 37-45). Upon rehearing before the court *en banc*, the eight judges divided evenly as to the views expressed by the majority of the panel (Pet. 46-47). However, it was agreed by all that "economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution," a position which had been conceded by the government on argument.[1] The case was remanded, with permission to the Attorney General to reopen the case for further consideration based upon additional evidence and information not theretofore considered (Pet. 46-47).

The situation here is decidedly different. Petitioner had never suffered any discrimination by reason of his regular church attendance in his native town. His father was regularly employed (although it did not appear whether he was also a regular attendant at church). There is no showing of a deprivation of the right to earn a living. The Special Inquiry Officer took for granted that petitioner would

[1] The Third Circuit felt that the administrative officials appeared to have taken a contrary position during the administrative consideration of the *Dunat* case.

be imprisoned for "jumping ship" in Italy (Pet. 31), but this is "a criminal sanction that is reconcilable with generally recognized concepts of justice." *Blazina* v. *Boschard*, 286 F. 2d 507 (C.A. 3) certiorari denied, 366 U.S. 950.

Petitioner argues that the administrative ruling in *Matter of Kale*, Adm. Dec. A9 555 532, announced improper criteria which were followed in this case. As the court of appeals points out (Pet. 24), that ruling should not be read as denying that deprivation of the chance to earn a livelihood could constitute physical persecution; the language about "incarceration" (on which petitioner relies) was directed to the contention that imprisonment for jumping ship was physical persecution. Moreover, it is unnecessary to determine whether there is a conflict (as petitioner asserts) between the standards set up administratively in *Kale* and those established by the Third Circuit in *Dunat* for—as the Special Inquiry Officer, the district court, and the Second Circuit all found—application of the standards of *Dunat* would not bring about a different result in the present case. There would be no purpose in remanding the case where no different disposition could be made upon the evidence. Cf. *Chan Sik Lee* v. *Kennedy*, 294 F. 2d 231 (C.A. D.C.), certiorari denied, 368 U.S. 926.

Chung Fu Sheung v. *Barber*, 269 F. 2d 497 (C.A. 9), also relied upon by petitioner, is inapposite, for the language of the particular statute there involved is wholly different from Section 243(h), which vests a broad discretion in the Attorney General.

2. Petitioner's further contention that he should have been informed of the provisions of Section 245

(a) of the Immigration and Nationality Act (8 U.S.C. 1255) is without merit. That section, as it then read, applied only to an alien who was lawfully admitted to the United States as a bona fide nonimmigrant and who is continuing to maintain that status. If petitioner ever was a "bona fide nonimmigrant", he lost that status twenty-nine days after his admission and had no standing to invoke the benefits of this section. *United States ex rel. Citroen* v. *Shaughnessy*, 132 F. Supp. 445 (S.D. N.Y.); *United States ex rel. Trujillo-Gonzalez* v. *Esperdy*, 186 F. Supp. 909 (S.D. N.Y.). Moreover, the statute was amended on July 14, 1960, 74 Stat. 504, so as to be inapplicable to alien crewman, and the amended statute would now govern petitioner's case. *Fassilis* v. *Esperdy*, 192 F. Supp. 84 (S.D. N.Y.).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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